117-615

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 207.

ROBERT G. CAMPBELL, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED MARCH 20, 1883.

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INDEX.

	Original.	Print.
Declaration	1	1
Notice to plead	4	2
Bill of particulars	5	2
Subpœna	11	4
Marshal's return	12	5
Plea	13	5
Joinder of issue	14	5
Additional plea	15	6
Joinder of issue	16	6
Verdict and judgment	17	6
Bill of exceptions	19	7
Contract between Owen O'Hare *et al.* and The District of Columbia, Sept. 21, 1871	20	7
Letter of D. E. Davenport to Gen'l O. E. Babcock, Superintendant Washington Acqueduct, April 15, 1872	67	21
Act of Assembly of D. C. to provide for a deficiency of appropriation for laying water mains directed by act of Congress July 14, 1870, Jan. 26, 1873	73	23
Stipulation as to receipts, &c.	75	24
Order setting aside report of auditor	80	26

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Order setting aside report of auditor, &c.	81	26
Judgment in General Term	82	26
Motion for new trial	84	27
Proceedings in General Term	85	27
Judgment	85	27
Writ of error and service	87	28
Bond	88	29
Clerk's and judge's certificate	90	29

1 *Declaration, Notice to Plead, and Acc't. Filed June* 12, 1874.

In the Supreme Court of the District of Columbia.

ROBERT G. CAMPBELL
vs.
DISTRICT OF COLUMBIA. } At Law. No. 12593.

Declaration.

The plaintiff sues the defendant for money paid by the plaintiff for the defendant at its request; for money received by the defendant for use of the plaintiff; for money found to be due from the defendant to the plaintiff on accounts stated between them, and for work done by the plaintiff for the defendant at its request, and for materials furnished to the defendant by the plaintiff at the defendant's request.

And the plaintiff further sues the said defendant for that, whereas, the said defendant heretofore, to wit, on the 1st day of August, 1872, at the city of Washington, in the District of Columbia, was indebted to the said plaintiff for the sum of $10,084.00 lawful money,
2 for work done and materials furnished by the plaintiff to the defendant at its request, in and about the construction of a thirty-six inch water main in the city of Georgetown, in the District of Columbia, and being so indebted, the said defendant in consideration thereof, afterwards, to wit, on the day and year aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said last-mentioned sum of money, when the said defendant should be thereunto requested.

And whereas, also afterwards, to wit, on the day and year aforesaid, at the said city of Washington, in consideration that the said plaintiff at the like special instance and request of the said defendant had before that time performed labor and furnished materials for the said defendant, in and about the construction of a water main in the city of Georgetown, in the said district, the said defendant undertook and then and there faithfully promised the said plain-
3 tiff to pay him so much money as he therefor reasonably deserved to have of the said defendant, and when the said defendant should be thereunto afterwards requested.

And the said plaintiff avers that he therefor reasonably deserves to have the further sum of $10,084.00, of the like lawful money, whereof the said defendant afterwards, to wit, on the day and year last aforesaid had notice.

Nevertheless, the said defendant, not regarding his several promises and undertakings, did not pay the several sums of money or either of them, or any part thereof, to the said plaintiff, although often requested so to do, and has wholly neglected and refused and still neglects and refuses so to do, to the damage of the plaintiff of $12,000.00.

And the plaintiff claims judgment for said sum of $12,000.00, according to the particulars of demand hereto annexed, with interest.

ENOCH TOTTEN,
Att'y for Pl'ff.

4 The defendant is to plead hereto, on or before the next special term of this court, occurring twenty days after service hereof.

ENOCH TOTTEN,
Att'y for Pl'ff.

5 *Particulars of Demand.*

District of Columbia (36-in. water main) to R. G. Campbell, Dr.

To 23 days' time, taking up plank road, @ $2	46 00
" 392 " " D. R. R. tr'k, @ $2	784 00
59 " horses and carts, @ $3	177 00
300 " relaying D. R. R. tr'k, @ 2	600 00
278 " excavating ditch for Dr. R. R. track, @ $2	556 00
150 days' time, mechanics laying R. R. T., @ $3	450 00
134 days' time, horses and carts, @ $3	402 00
7 " mason's work, cutting wall at bridge, @ $5	35 00
25 days' time, water carrier, @ 1	25 00
30 " superintendant, @ 5	150 00
To handling and setting 36-inch stop-cock	80 00
" difference in cost of 1-inch air-cock and pipe, drilling and setting same	5 00
" one 4-inch cast-iron bend	5 00
" " " sleeve	2 50
" hauling same	1 50
To cutting one 12-inch pipe	6 00
6 " extra lead run solid on two 48-inch joints	20 00
" hauling one 36-inch sleeve	1 50
To 6 feet sewer pipe, Mr. Birch, @ 50c.	3 00
" 4 bends, @ $2	8 00
" cartage on same	1 00
" 2 days' time, plumber and assistant, @ $6	12 00
" 1 4-inch stop-cock at vault	45 00
" hose nozzle, coupling, and cap at vault	10 50
" 1 4-inch joint at vault	3 00
" ¾ day's time, plumber and assistant	4 50
" manhole and cover for cock at vault and hauling	70 00
" 32 clamps and anchors for stop-cock boxes	40 00
" repairing cock in cock vault opposite livery stable	2 00
" 103 feet pipe and 18 fittings near bridge	54 45
" 2 stop-cocks and wooden boxes	10 00
" 2 lead connections, @ $5	10 00
" 2 taps, @ $5	10 00

	To 1 lb. solder	60
7	" 3¾ days' time, plumber and assistant	22 50
	" raising and making connection at Union Hotel at night	75 00
	" extra lead and labor on 200 36-inch joints, @ $3.50	700 00
	" 1 large centre at vault	35 00
	" 1 small " "	10 00
	" repairing leak near market, Davenport's division	10 00
	" 1 gum joint for manhole at stop-cock	12 50
	" 48 lbs. nuts and bolts for manhole, @ 15c.	7 20
	" 1 extra 36-inch joint, made inside sleeve, near 36-inch stop-cock	12 50
	" 9 cast-iron stop-cock boxes, @ $30	270 00
	" 108 feet 12-inch pipe, lowered, @ $2.25	243 00
	" raising and altering pipe and putting in 4-inch stop-cock at vault	25 00
	" hauling from line of works to pipe yard, 12 reducers, $10.00; 1 36-inch sleeve, $1.50	11 50
	" 1 30-inch sleeve, 1.25; 2 12-inch pipe, 3.00	4 25
	To 2 36-inch pipe, 24.00; 1 48 x 30 reducer, 15.00	39 00
8	" 4 30-inch pipe, @ 10.00	40 00
	" 1,400 yards of excavation, below 8 feet in depth at bridge, at @ $1.75	2,450 00

To losses sustained and delays occasioned by the engineer not providing the necessary castings for making the curve between Green and Montgomery streets:

6 caulkers, 4 days each, 24 days, @ $4	96 00
37 laborers, 4 days each, 148 days, @ $2	296 00
Foreman of the derricks, 4 days, @ $4	16 00
General superintendent, 4 days, @ $5	20 00

For delays occasioned by engineer not providing necessary pipe at Washington:

6 caulkers, 3 days each, 18 days, @ $4.00	72 00
37 laborers, 3 days each, 111 days, @ $2.00	222 00
Foreman of derricks, 3 days, at 4.00	12 00
General superintendent, 3 days, @ 5.00	15 00

9 For delays occasioned at bridge by the failure of the outlet not being large enough to admit of the 48-inch pipe:

6 caulkers, 7 days each, 42 days, @ 4.00	168 00
37 laborers, 7 days each, 259 days, @ 2.00	518 00
Foreman of derrick, 7 days, @ $4	28 00
General superintendent, 7 days, @ $5	35 00

For delays occasioned by engineer failing to provide the branch 12-inch at High street:

6 caulkers, 4 days each, 24 days, @ 4.00	96 00
37 laborers, 4 days each, 148 days, @ 2.00	296 00

Foreman, 4 days, @ $4	16 00
General superintendent, 4 days, @ $5	20 00
For 2,000 feet of lumber, shoreing up the cut at the bridge, at $35 per M	70 00
To cutting out and renewing 15 lead joints between Rock Creek bridge and market-house, @ $21 each	315 00
To tearing down and rebuilding a stop-cock vault near the bridge, done under the order of the superintendent of the work, and ordered to be torn down and rebuilt by the engineer:	
8 barrels cement, @ $2.50	20 00
8 loads sand, @ 1.25	10 00
1,000 bricks	15 00
2 bricklayers, 5 days each, 15 days, @ $5	75 00
3 laborers, 5 days each, 15 days, @ $2	30 00
1 superintendent, 5 days, @ $5	25 00
	$10,084 00

Add interest from July 1, 1872.

Filed June 12, 1874.

R. J. MEIGS, *Clerk.*

Spa. to Ans. Issued June 12, 1874.

In the Supreme Court of the District of Columbia, the 12th day of June, 1874.

ROBERT G. CAMPBELL, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 12593.

Original Summons.

The President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court on the first day of its special term, occurring twenty days after service of this writ on you, to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness—

D. K. CARTTER,
Chief Justice.

[SEAL.]

R. J. MEIGS,
Clerk.
By JOB BARNARD,
Asst. Clerk.

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

Endorsements on the above writ appear as follows:

Return of Marshal.

ROBERT G. CAMPBELL, *vs.* DISTRICT OF COLUMBIA. } No. 12593. At Law.

Issued June 12th, 1374. Pd. $1.00.

Served copies of the declaration, notice to plead, and this summons, on the defendant by W. A. Cook, att'y, the 12th day of June, 1874.

A. SHARP,
Marshal.

June 12, 1874. Sharp.

Service acknowledged June 12th, 1874.

WILLIAM A. COOK,
Att'y, D. C.

13 *Pleas and Appearance of Wm. A. Cook for defendant.*

In the Supreme Court of the District of Columbia, the — day of June, 1874.

ROBERT G. CAMPBELL, Plaintiff, *vs.* THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 12593.

Pleas.

The defendant says that it never was indebted as alleged. And for a further plea the defendant says that before action it satisfied and discharged the plaintiff's claim by payment.

WILLIAM A. COOK,
Att'y, D. C.

Endorsed: Plea of non-debit and payment. The clerk will please file. William A. Cook for def't. Filed June 25, 1874. R. J. Meigs, clerk.

14 *Joinder and Note of Issue, June 25, 1874.*

In the Supreme Court of the District of Columbia, the 25th day of June, 1874.

ROBERT G. CAMPBELL, Plaintiff, *vs.* THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 12593.

The plaintiff takes issue upon the defendant's plea.

ENOCH TOTTEN,
Att'y for Plaintiff.

Filed June 25, 1874.

R. J. MEIGS, *Clerk.*

15 *Plea "Puis Darrien" Continuance. Filed June 15, 1875.*

In the Supreme Court of the District of Columbia, the 15th day of June, 1875.

ROBERT G. CAMPBELL, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 12593.

Additional Plea. (*Puis Darrien.*)

And for a further plea defendant says that after the last pleading in this action, and before this day, it satisfied and discharged the plaintiff's claim by payment.

By WILLIAM BIRNEY,
Its Attorney.

Endorsed: Clerk will please file. W. Birney, att'y for def't. Filed June 15, 1875. R. J. Meigs, clerk.

16 *Joinder in issue on Pleas "Puis Darrien" Continuance. Filed June 22, 1875.*

Supreme Court of the District of Columbia.

CAMBELL
vs.
DISTRICT OF COLUMBIA, } At Law. No. 12593.

The plaintiff joins issue on the defendant's plea *puis darrien* continuance, and denies the same.

TOTTEN, *For Pl'tf.*

Filed June 22, 1875.

R. J. MEIGS, *Clerk.*

17 *Verdict and Judgment for Def't. Jan'y 30, 1883.*

Supreme Court District of Columbia holding a Circuit Court.

ROBERT G. CAMPBELL
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 12593.

Judgment of Circuit Court.

Now comes here as well the plaintiff, by his attorney, Mr. Totten, as the defendant by its attorney, Mr. Riddle, and a jury of good and lawful men of this District, to wit, William P. Young, Henry Iseman, James McDermott, George H. Trunnell, George H. Baxton, Casper Kneessi, Benjamin Charlton, William C. Duvall, Melville Shuster, Charles Crunimell, James M. Foster, and R. Carter Ballantyne, who being duly sworn to try the issues above joined, after hearing the evidence in the case, on their oath say, that they find said issues in favor of the defendant. Therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof

without day, and recover against the plaintiff the costs of its
18 defense, taxed at $——, and have execution thereof.

And thereupon the plaintiff tenders to the court here his bill of exceptions to the rulings of the court on the trial of this case, and prays that they may be duly signed, sealed, and made part of the record, which is done accordingly.

And now comes the said plaintiff and moves the court for a new trial on the bill of exceptions. M. 18, p. 284, January 30th, 1883.

19 *Bill of Exceptions. Filed Jan'y* 30, 1883.

In the Supreme Court of the District of Columbia.

ROBERT G. CAMPBELL
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 12593.

Bill of Exceptions.

This cause having come on for trial, and a jury having been duly sworn, the plaintiff, to maintain the issues on his part, gave evidence to the jury tending to show:

That on the 21st day of September, 1871, after due advertisement and proposals, a contract was made between the District of Columbia and a certain copartnership firm known as O'Hare, Heimber & Co., for laying a 36-inch water main in what was designated as the "Georgetown Division," for the prices and upon the stipulations in said contract mentioned; and that the said contract is in the words and figures following, to wit:

20 *Contract and Specifications for Laying Cast-iron Water Pipes, Stop-Cocks, and Special Castings, under an act of Congress approved by the President July* 14, 1870, *and an act of the Legislative Assembly of the District of Columbia, approved by the Governor July* 20, 1871.

This agreement, made and concluded this 21st day of September, in the year one thousand eight hundred and seventy-one, between Owen O'Hare, Henry Heimber, Daniel E. Davenport, & Edward Martindale, doing business under the style of O'Hare, Heimber & Co., of Washington, in the District of Columbia, of the first part, and George H. Elliott, major of engineers, U. S. A., chief engineer of the Washington aqueduct, and E. L. Stanton, acting Governor of the District of Columbia, acting for and in behalf of the District of Columbia, of the second part:

Witnesseth, That the said parties of the first part have
21 agreed, and by these presents do agree, with the said party of the second part, for the considerations hereinafter mentioned and contained, and under the penalty expressed in a bond, bearing even date with these presents, and hereunto annexed, at their own proper cost and expense, to furnish all the materials and do all the labor called for by this agreement, in the manner and

under the conditions hereinafter specified; and have further agreed that the chief engineer of the Washington aqueduct shall be, and is hereby, authorized to appoint from time to time such civil engineers and assistants and inspectors under him, as he may deem proper, to inspect the materials to be furnished; and the work to be done under this agreement, and to see that the same conforms strictly to the specifications hereinafter set forth.

22 Specifications.

The work to be done consists in excavating and refilling trenches, whether in earth or rock; in taking up and replacing street pavements and other surfaces; in hauling and laying or setting pipes, special castings, stop-cocks, air-cocks, and other appurtenances, to a complete system of distribution; in cutting pipes, making joints, preparing foundations; in repairing damages caused to gas or water pipes, sewers, drains, cisterns, &c.; in cleaning the streets and grounds of all rubbish or refuse caused by the above work; in furnishing lead and gaskets for joints; fuel for melting lead; clay and rope for bands; supports for pipe; wrought-iron straps and bolts for securing caps, reducers, and other parts liable to draw; in furnishing air-cocks; in furnishing and setting wooden or other
23 boxes for stop-cocks and air-cocks, and furnishing and fitting cast-iron covers thereto; in furnishing all materials for any masonry required, and all other materials, tools, and labor necessary for the complete fulfillment of this contract (except pipes, special castings appertaining thereto, and stop-cocks).

The main will commence in the effluent pipe vault of the distributing reservoir of the Washington aqueduct, at the easterly end of the 48-inch mouthpiece, with which it will be connected by a pipe, reducing from 48 inches to 36 inches in diameter. In the vault it will also be connected by a stand pipe with the Washington aqueduct 30-inch main leading from the auxiliary gate-house.

It will be laid through and outside of the vault, parallel with the 12 and 30-inch mains, across the fields to foundry branch
24 pipe vault, where it will be cross-connected with the 30-inch main by a pipe 30 inches in diameter.

Leaving the foundry branch, it will follow the road along the Chesapeake and Ohio canal to College pond, which it will cross on an embankment of stone. From there it will be continued along the canal road and Bridge street, in Georgetown, into Aqueduct street, and along Aqueduct street into the west abutment of Rock Creek bridge.

In this abutment it will be enlarged from 36 to 48 inches in diameter, and will be connected with the 48-inch pipe that forms the north arch of the bridge.

In the east abutment it will be connected with the 48-inch pipe by a pipe reducing from 48 to 36 inches in diameter, and will be continued through the abutment and into Pennsylvania avenue. It will be laid along Pennsylvania avenue to L street, and along L street to New Jersey avenue, where it will terminate in a 36-inch branch, with a 30-inch outlet.

25 The "reservoir division" extends from the distributing reservoir of the Washington aqueduct to the west side of foundry branch.

The "Georgetown division" extends from the west side of foundry branch to Rock Creek bridge.

The "West Washington division" extends from Rock Creek bridge to the west side of Fifteenth street.

The "East Washington division" extends from the west side of Fifteenth street to the centre of New Jersey avenue.

In Bridge and Aqueduct streets, Georgetown, and in Pennsylvania avenue and L streets, Washington, branches with 12-inch outlets will be set and connected with the main, and with the corporation 6-inch distribution pipes, wherever directed by the engineer.

26 The pipes are to be laid in such locations and upon such lines and grades as the engineer may designate.

All the pipes, stop-cocks, and special castings appertaining thereto, except the air-cocks, will be furnished to the contractor at the railroad depot, or on such wharf or wharves in the cities of Georgetown and Washington, as the engineer may elect.

The cost of handling after delivery, and all other expenses of labor, materials, tools, &c., incurred in the hauling, distributing, and laying of said pipes, stop-cocks and other appurtenances, shall be paid by the contractor.

27 The contractor shall be responsible for any loss incurred or damage done to any pipes or appurtenances from the time of delivery until laid and covered.

Proper implements and tools necessary for the safe and convenient handling and laying of the pipes and appurtenances shall be furnished by the contractor. Great care shall be taken in handling to prevent the pitch coating being rubbed off. Any damage done shall be made good at the expense of the contractor; and such precautions shall be used for this purpose as the engineer may direct.

No pipes or appurtenances shall be laid or used which are known or may be found to be in any way defective. Notice shall always be given to the engineer or inspector of any such defective or imperfect material, and it shall be set aside and conspicuously

28 marked with the letter "D" in white paint. If any defective pipe or other casting shall be found to have been laid, it shall be removed and replaced by a sound pipe or casting, without charge.

Trenching.

The trenches for the pipes shall be opened in accordance with the lines and grades given for the work, and as far in advance of the pipe-laying as may be required by the engineer, but no further.

The paving, graveling, macadamizing, or other surface material shall be carefully taken off and put upon one side of the trench. The remaining excavation shall be put upon the other side of the trench, so that there shall be no waste or loss of material, and in such manner as to leave a space of two feet between the edge of the trench and the material so deposited.

29 The width, depth, and form of the trench will be determined in all cases by the engineer or his assistant, and defined upon the ground by appropriate stakes, and demarcations, and the dimensions so given are to be carefully and accurately comformed to by the contractor.

In earth and rock excavation, all necessary joint holes shall be dug. They shall be at least one foot deep by four feet long, and have a width at least four feet greater than the diameter of the pipe.

The contractor shall make additional excavations wherever required, for the purpose of securing a good foundation, and shall refill with suitable material in the manner required.

The cost of refilling the trench is to be included in the price for earth excavation, and no allowance will be made for earth removed beyond the lines and grades required by the engineer.

Rock excavation.

30 Where rock is encountered it shall be uncovered and taken out to any width required by the engineer, and to a depth of one foot below the grade line of the bottom of the pipe. The excavation so made shall be refilled in layers six inches deep, and properly tamped with earth not required for filling the other trenches, or borrowed for the purpose. No rock is to be taken out until it has been measured by the engineer. The cost of refilling is to be included in the price for rock excavation, and no allowance will be made for rock removed beyond the lines and grades required by the engineer.

Only such material as requires blasting will be estimated as rock.

In excavating the trench, either in earth or rock excavation, great care must be taken not to injure the twelve and thirty-inch mains of the Washington aqueduct, and they shall be protected as the engineer may direct. Any damage done will be made good at the expense of the contractor.

31 Masonry.

Piers of rubble masonry shall be built by the contractor wherever required by the engineer. The masonry will be composed of sound, well-shaped stones, with level beds and vertical joints, laid in hydraulic cement mortar.

Vaults of brick masonry will be built by the contractor wherever required by the engineer.

The brick masonry will be composed of hard-burned red bricks, laid in hydraulic cement mortar.

The mortar used in stone and brick masonry will be composed of one part of such American cement as may be directed by the engineer, and two parts of clean, sharp sand.

Blocking.

32 Each pipe and casting shall be laid upon two blocks, disposed as may be directed, and firmly bedded in the ground, true to grade, and shall be finally adjusted by means of wedges, two to each block, which shall be left in place, the blocks to be

made of sound Georgia pine lumber, six inches square and three feet long. The wedges shall be made of white oak lumber, four inches square at the butt and twelve inches long.

Laying.

The pipes (which are 12 feet 6½ inches and 9 feet 6½ inches in length) and castings, when laid, shall conform accurately to the lines and grades required, and castings designed for particular places shall be used therein.

All fixtures pertinent to the supply or distribution shall be set or laid at the required points, in such manner as the engineer may direct.

The reducers, bends, and other parts as are liable to draw shall be firmly secured by wrought-iron straps and bolts. The straps and bolts shall be made from the best American iron, and the
33 size and workmanship, as well as the material, shall be in all respects satisfactory to the engineer. All wrought-iron work shall be thoroughly coated with coal-tar before being covered with earth; the caps of such branches as require to be capped shall be bolted and well secured. The manhole pipes shall be carefully capped, and all other appliances necessary to the perfect working of the distribution when the water is let on shall be made and completed.

Any omission of branches, stop-valves, or other appurtenances intended to be laid, shall be corrected when required, by reopening the trench, if it has been filled up, and introducing what may have been omitted.

When the pipes are laid the spigots shall be so adjusted in the sockets as to give a uniform space all around; and if any pipe does not allow sufficient space, it shall be replaced by one of
34 proper dimensions, and the pipes shall be separated such a distance between the end of the spigot and the shoulder of the socket as may be required by the engineer. No claim shall be made nor allowed for extra quantities of lead or gasket.

The gasket packing shall be of clean, sound hemp yarn, braided or twisted, applied in one piece, and tightly driven, so as to leave the required width for the lead, which shall not be poured until the inspector has pronounced the packing and the depth to be satisfactory.

The width of lead required for the various sizes is as follows: 36-inch pipe, 2½ inches; 30-inch pipe, 2¼ inches; 12-inch pipe, 1⅞ inches; 6-inch pipe, 1⅛ inches. The thickness of lead will be about as follows: For the 30 and 36-inch pipes, from one-half to nine-sixteenths of an inch; for pipes 12 inches in diameter and under, from six-sixteenths to seven-sixteenths of an inch.

35 The lead shall be of the best quality of pure and soft lead, and in every respect suitable for packing water pipes. Before running the lead the joints shall be carefully wiped out, to make them clean and dry; the joint shall be run full at one pouring, and the melted pot shall always be kept within twenty feet of the joint about to be poured. The joints shall be faithfully caulked by com-

petent mechanics in such manner as to secure a tight joint without overstraining the iron of the socket. The caulking shall be done toward the place of the gates and other points where the lead may be porous, so as to drive it together at those points. The lead, after being driven, shall be flush with the face of the socket.

The pipes and all other castings shall, as they are laid, be carefully swept and cleaned of any earth or rubbish which may have found place inside during or before the operation of laying.

36 Every open end of a pipe shall be plugged or otherwise closed before leaving the work for the night.

Rubber gaskets, one-fourth of an inch thick and of the width of the face of the sockets, are to be furnished by the contractor, and set with manhole covers and with the caps or plugs on sockets and on all flange-joints, wherever required, without charge.

Air-cocks, three-fourths of an inch in diameter, connected with one foot of three-quarter-inch lead pipe, will be furnished and set by the contractor, whenever directed by the engineer. The air-cocks will be made of composition metal, and of such form as the engineer may require. The price of each air-cock will include the cost of the lead pipe required for it.

Wooden boxes, with cast-iron frames and covers of the Washington Aqueduct pattern, will be furnished and set wherever required by the engineer. The boxes will be one foot seven inches by two feet at the top, two feet four inches by two feet eight inches at the

37 bottom, and four feet deep. They will be composed of sound Georgia pine planks and scantlings, securely spiked together.

The frames and covers for the top of the box will be of cast iron, and the covers will have the intials P. W. cast in raised letters, three inches long. Each box will contain about 50 feet (broad measure) of pine, and each frame and cover will weigh about 170 pounds.

In cutting through the wall of the distributing reservoir pipe vault, great care must be exercised so as not to injure the masonry. Any damage done will be at the expense of the contractor, and will be made good by him. The excavations through the wall, and also through any other masonry encountered in the streets of Georgetown and Washington, will be estimated and paid for as rock excavation.

At College Pond, on the Georgetown division, the bottom of the pond is to be excavated to such depth and width as the engineer may direct. On the bottom thus prepared is to be built an embank-

38 ment of sound, durable stones, satisfactory to the engineer, none of which shall be larger than six inches in any dimension.

The slopes and top of the embankment are to be protected by dry rubble masonry, 18 inches in thickness, the joints of which shall extend entirely through the wall. The 36-inch main is to be laid in the embankment, six inches below the bottom of the paving, and the top of the paving is to be six inches below the flow line of the pond. The length of the embankment will be about 90 feet, and its height will vary from 6 to 10 feet. It will be 12 feet wide on top, with side slopes of 2 feet base to 1 foot rise.

At the crossings of all sewers, gas or water pipes the 36-inch main is to be laid over or under them, as the engineer may direct. Any damage done to them will be at once made good by the contractor, without expense to the District of Columbia.

In L street, Washington, between 20th and 22nd streets,
39 the pipe will be laid on piers of rubble-stone masonry, laid in cement. These piers will be built two and one-half feet wide and five feet long on top. Their sides and ends will batter one inch in a foot, and the foundations will be of such depth as the engineer may direct. Their height will vary from nine to fourteen feet.

Public travel.

The contractor shall keep the streets and highways in which he may be at work open for carriages to pass, so far as practicable, and shall bridge the trenches at all street crossings, roads, or private ways, and shall conduct his work for this object in such manner as the engineer may from time to time direct. No sidewalk shall be obstructed where it is possible to avoid it.

The contractor shall, during the night time, put up and maintain such barriers and red lights as will effectually prevent the
40 happening of any accident, in consequence of his work, for which the District of Columbia might be liable, and the contractor shall be liable for all damages occasioned in any way by his act or neglect, or that of his agents, employés, or workmen.

Back filling.

No pipe shall be covered until special orders have been given to that effect. In covering the pipes no stones shall be laid in contact with them.

The earth shall be filled into the bottom of the trench, under, around, and to the top of the pipes and other castings, in such manner as may be required, and shall be carefully packed and well rammed with proper tools for the purpose. The earth shall be properly moistened, when deemed necessary by the engineer. No large lumps nor frozen earth will be allowed to be filled in. Care shall be taken to give the pipe a solid bearing throughout its entire length. The earth filling above the pipes shall be spread in
41 *in* layers not exceeding half a foot in thickness, and shall be sufficiently compacted by ramming to prevent after settlement.

The trenches shall be refilled with the material furnished by their excavation, provided it be of proper quality, of which the engineer shall be the judge; but in case insufficient suitable material is obtained in this way, that which is suitable shall be furnished by the contractor without charge, and he shall remove from the ground, or uniformly spread over the surface, all material not used in filling, as may be required by the engineer.

In all cases where required the class of surface before existing shall be replaced, so as to be in every way equal to that surface in materials and workmanship, and satisfactory to the engineer.

If more paving, gravel, or other material is required to restore the surfacing of the streets, highways, or private ways to as
42 good condition as before being disturbed by the contractor, it shall be furnished at his own expense.

General sections.

Any unfaithful or imperfect work that may be discovered before the final acceptance of the work shall be corrected immediately on the requirement of the engineer, notwithstanding that it may have been overlooked by the proper inspector and estimated. The inspection of the work shall not relieve the contractor of any of his obligations to perform sound and reliable work, as herein described.

The contractor shall keep the work in good repair for six months after the water is let on, and shall correct and repair promptly during that time all leaks and failures of whatever description, and all settlements and irregularities of paving or other surfacing, and shall deliver the work in all respects in good condition at the end of that time.

43 And the said parties of the first part further agree that the said chief engineer shall be, and is hereby, authorized to retain out of any money payable to the said parties of the first part under this agreement the sum of ten per cent. on the amount of the contract, and to expend the same in the manner hereinafter provided in making such repairs of the said work as the engineer may deem necessary.

And it is further agreed that if at any time before a period of six months after the water is let on any portion of the works, or the surfacing of any street or highway on the line of the works, shall, in the opinion of the engineer, require any repairs in consequence of the want of thoroughness or faithfulness on the part of the contractor in the execution of the work, and the engineer shall notify said parties of the first part to make the repairs so required,
44 and if the said parties of the first part shall neglect to make such repairs to the satisfaction of the engineer within ten days from the date of the service of such notice, then the engineer shall have the right to employ such other person or persons as may be deemed proper to make the same; and the said engineer shall pay the expense thereof out of the sum retained by the said party of the second part, as herein mentioned.

And the said chief engineer, as the agent of the party of the second part, hereby agrees that, upon the expiration of the said period of six months, provided all the works and surfacing shall at that time be in good order, the said party of the first part shall be entitled to receive the whole or such part of the sum last aforesaid as may remain after the expense of making the said repairs, in the manner aforesaid, and any other charges as may be provided
45 herein, shall have been deducted therefrom.

The parties of the first part have deposited at the First National Bank of Washington the sum of one thousand dollars to the credit of the Governor of the District of Columbia as a gurantee that they will enter into, carry on, and complete the work.

And it is further agreed that in case the said parties of the first part shall well and truly enter into, carry on, and complete the work, according to the specifications, and to the satisfaction of the party of the second part, the said amount of one thousand dollars shall be refunded to the said parties of the first part by the Governor aforesaid; otherwise, the said sum is to be forfeited to the District of Columbia as liquidated damages.

The quantities of work to be done, as given in the accompanying notice to contractors, are approximate only, and the chief
46 engineer therefore specially reserves the right to increase or diminish them, as may be deemed necessary by him. The price contracted for, for each item, is to include the cost of all work and materials incidental thereto, such as damming, bailing, pumping, and draining away water, furnishing all necessary tools and machinery, furnishing, erecting, and removing, shoring, and bracing, whenever required, furnishing water for all uses, and shutting off and letting on the water, when forming connections with other pipes.

In all operations connected with the work herein specified, all city or District of Columbia ordinances, and all laws controlling or limiting in any way the actions of those engaged on the works, or affecting the materials applied to them, must be respected and strictly attended to.

All directions and instructions not spoken of in this contract will be given by the chief engineer of the Washington aqueduct
47 for the time being, or his authorized assistants; and he shall have it in his power to make such changes in the forms, dimensions, grades, and alignments of the work as the interest of the District of Columbia shall seem to require. If any such changes are made after the commencement of any particular piece of work, and the changes thereby should increase the cost, the engineer shall allow such an amount as in his judgment he considers to be fair and equitable as between the parties.

All grades, dimensions, locations, and heights of the different kinds of work will be given by proper stakes and bench marks; such stakes and bench marks must be preserved by the contractor until the prosecution of the work requires their removal. If the contractor, in a willful or careless manner, removes or causes the removal of any of said stakes or bench marks before the prosecution of the work requires it, the expense of replacing them will be
48 charged to the contractor, and the amount deducted from the amount due on his final settlement.

The engineer is to make all measurements, and to decide as to the amount or quantity of the several kinds of work, and as to the quality of all materials. All work and all materials shall be satisfactory to him and subject to his rejection.

The chief engineer shall also decide as to the meaning and intent of any portions of these specifications, where the same may be found obscure, and he shall have the right to correct any errors or omissions in them, when such correction is necessary for the proper fulfillment of their intention, the action of such correction to date from the time that the engineer gives due notice thereof. In case

bidders suspect any possible difference of opinion between themselves and the engineer as to the meaning of any part of the specifications, they must ascertain and bid upon the engineer's
49 understanding of it, expressed in writing, at the solicitation of the bidder, also expressed in writing.

The engineer's decision as to any of the foregoing matters shall be final and binding upon the parties hereto.

It is intended that the contract and specifications shall cover the completion of the work fit for use, and the contractor shall do all work and furnish all materials to that end.

No claims for extra work shall be made unless the same shall be done in pursuance of a written order from the engineer. All claims for extra work so ordered must be made to the engineer, in writing, before the payment of the next succeeding estimate after the work was performed; and, failing to make such claim, the same shall be considered as abandoned by the contractor.

The value of any extra work is to be determined by the engineer, and his decision thereon shall be final and binding upon the
50 parties hereto.

Any omission to disapprove of any work by the engineer at the time of a monthly or other estimate shall not be construed to be an acceptance of any defective work.

The contractor shall not let, assign, or transfer, by attorney or otherwise, this contract or any part thereof, or sublet any part of the work to any other person or persons, and shall give his personal attention to its fulfillment.

The contractor shall employ competent foremen, experienced mechanics, and others skilled in the several parts which are given them to do; and shall immediately discharge, whenever required to do so by the engineer, any men considered by said engineer incompetent or disorderly; and such persons shall not again be employed upon the works.

Approximate estimates will be made as soon after the first of each month as practicable by the engineer during the pro-
51 gress of the work, and an order for ninety per cent., in current funds, of the value of the work done, will thereupon be given by the chief engineer to the contractor, for payment at the office of the proper financial agent of the District of Columbia. It is expressly understood that such estimates shall only be made when the work progresses as rapidly as may be required by said engineer, and in accordance with the provisions of this contract, and no payments will be made except for such portions of the work as are refilled, repaved, and completely finished.

It is hereby understood that the prices and amounts paid under this contract, refer simply to the quantities of work which shall be done, as the future or final measurements of the work may prove them to be, the estimates exhibited at this date being but approximate; and no claims growing out of misconception of the quantities, or kinds of work, or of any errors in the approximate
52 statements of them, at this date, are to be allowed or considered valid.

And the said parties of the first part hereby agree to pay to the said party of the second part all losses incurred or damages done to any of the said pipes or appurtenances from the time of the delivery of the same to the contractor, or any agent of said contractor, until the same are laid and covered.

And the said parties of the first part hereby further agree that if, in the opinion of the engineer, the several works, or any portion thereof, are not being done in accordance with the terms, all and several of this contract, or are not proceeding at a rate which will insure the completion of the several parts thereof, and of the whole of the same, in the manner and with such materials, in such quantities and at such dates as are expressed in this contract and specifications, then it shall be lawful for the said engineer to pro-
53 ceed forthwith, and cause to be executed, all said works so improperly performed, and to supply new materials for those which are of improper quality, or use such materials as may be found on the works, and to employ such additional men as he may deem expedient, by "day's work" or otherwise, to properly forward and complete the work, or to expel the said parties of the first part and to proceed to complete the said work at the sole charge and expense of the said parties of the first part, without prejudice to the rights of said District of Columbia to recover damages of the said parties of the first part for breach of contract, after having given notice thereof, in writing, three days before employing such additional men, or procuring such additional and proper materials, or expelling the said parties of the first part; and the entire expenses incurred in executing the whole of said works shall be allowed and paid by the said parties of the first part to the said District
54 of Columbia, entirely in accordance with the decision of the chief engineer, and from which decision there shall be no appeal.

It is further mutually agreed that whenever this contract, in the opinion of the engineer, shall be completely performed on the part of the contractor, the engineer shall proceed with all reasonable diligence to measure up the work, and shall make out the final estimates for the same, and shall certify the same to the proper financial agent of the District of Columbia, who shall, except for cause herein specified, pay in current funds to the contractor, within thirty days after receiving said certificate, the balance which shall be found to be due, except as herein specified.

Wherever the word "engineer" is used herein it shall be understood to refer to the chief engineer of the Washington aqueduct, or to his properly authorized agents, limited by the particular duties intrusted to them.

55 Wherever the word "contractor" is used herein it shall be understood to refer to the party or parties contracting to perform the work to be done under these specifications, or the legal representatives of such party or parties.

And the said parties of the first part further agree that they will execute a bond in the sum of one-fifth of the value of the work to be done, and with such securities as shall be approved by the chief

engineer, for the faithful performance of this contract, conditioned to indemnify and save harmless the said District of Columbia from all suits and actions of every name or description brought against it, or any officer or agent of the said District of Columbia, for or on account of any injuries or damages received or sustained by any person, structure, or property by or from the said parties of the first part, their servants or agents, in the construction of said work,
56 or by or in consequence of any negligence in guarding the same, or any improper materials used in its construction, or by or on account of any act or omission of the said parties of the first part, or their agents, and for the faithful performance of this contract by the parties of the first part; and the said parties of the first part hereby further agree that so much of the money due to them under and by virtue of this agreement as shall be considered necessary by the engineer may be retained by the said party of the second part until all such suits for claims or damages, as aforesaid, shall have been settled, and evidence to that effect furnished to the satisfaction of the said engineer.

And the said parties of the first part further agree that said engineer may make alterations in the lines, grades, forms, or dimensions of the work herein contemplated, either before or after the commencement of construction. If such alterations diminish the
57 quantity of work to be done, they shall not constitute a claim for damages or anticipated profits on the work that may be dispensed with. If they increase the amount of work, such increase shall be paid for according to the quantity actually done, and at the price established for such work under this contract.

And it is further agreed that the work shall be commenced and carried on at such points, in such order of precedence, and at such times and seasons, as may, from time to time, be directed by the engineer.

The rate of progress in pipe-laying shall be made to conform to the rate of delivery of the pipes by the founders; and the contractor for laying shall have no claim for damage on account of any delay in their delivery by the contractor for casting the pipes.

And the said parties of the first part hereby agree to re-
58 ceive the following prices in full for furnishing all materials not excepted in these specifications, and all labor required in the aforesaid work; also, all loss or damage arising out of the nature of the work aforesaid, or from the action of the elements, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same; also, all expenses incurred by or in consequence of the suspension or discontinuance of said work, and for well and faithfully completing the same and the whole thereof, in the manner and according to the plans and specifications, and the requirements of the engineer under them, to wit:

Georgetown Division.

For all earth excavation, per cubic yard, forty (40) cents.

For all rock excavation, per cubic yard, one dollar and seventy-five ($1.75) cents.

For stone embankment, per cubic yard, two dollars and twenty-five ($2.25) cents.

For rubble-stone masonry, laid in cement, per cubic yard five ($5.00) dollars.

59 For rubble-stone masonry, laid dry, per cubic yard, three ($3) dollars.

For brick masonry, laid in cement, per cubic yard, nine dollars and fifty ($9.50) cents.

For taking up cobble-stone and blue-stone pavement, per square yard, seven (7) cents.

For relaying cobble-stone and blue-stone pavement, per square yard, twenty-five (25) cents.

For melting and removing 48-inch joints, each, thirty-five ($35) dollars.

For melting and removing 30-inch joints, each, thirty ($30) dollars.

For melting and removing 12-inch joints, each, ten dollars and fifty cents.

For cutting cast-iron 36-inch pipes, each, twelve dollars.

For cutting cast-iron 12-inch pipes, each, six ($6) dollars.

For cutting cast-iron 6-inch pipes, each, two ($2) dollars.

For gasketing, leading, and making 48-inch joints, each, twenty ($20) dollars.

For gasketing, leading, and making 36-inch joints, each, twelve dollars and fifty ($12.50) cents.

60 For gasketing, leading, and making 12-inch joints, each, five ($5) dollars.

For gasketing, leading, and making 6-inch joints, each, three ($3) dollars.

For furnishing and setting ¾-inch air-cocks, each, two dollas and fifty ($2.50) cents.

For furnishing and setting wooden stop-cock boxes, with iron frames and covers, each, twelve dollars and fifty ($12.50) cents.

For furnishing and setting wrought-iron bolts and bands, per pound, fifteen (15) cents.

For hauling and distributing castings, per ton of 2,000 pounds, one dollar and thirty-seven ($1.37) cents.

For hauling and distributing 36-inch stop-cocks, each, three ($3) dollars.

For hauling and distributing 12-inch stop-cocks, each, seventy-five (75) cents.

For hauling and distributing 6-inch stop-cocks, each, fifty (50) cents.

And it is further expressly agreed, that no money shall become due and payable under this contract, except upon the certificate of the said chief engineer, as hereinbefore provided; and the

61 said parties of the first part further agree that they shall not be entitled to demand or receive payment for any portion of the aforesaid work, except in the manner set forth in this agreement; and when each and every of the stipulations hereinbefore mentiond are complied with, and the chief engineer shall have given his certificate to that effect; thereupon the said duly authorized financial

agent of the District of Columbia, will, at the expiration of thirty days after such completion and delivery of said certificate, pay to the said parties of the first *parties of the first* part the whole amount of money accruing to the said parties of the first part under this contract, excepting such sum or sums as may be lawfully retained under any of the provisions of this contract herein set forth.

And the said parties of the first part further agree to commence the work herein contracted for, as soon as directed by the chief
62 engineer, and to continue it regularly as fast as pipes and appurtenances are furnished, and that they all shall be fully laid and completed for the introduction of water within thirty (30) days after the receipt of the whole number thereof required by this contract to be laid by the parties of the first part.

And it is further agreed that the parties of the first part shall forfeit one ($1.00) dollar a day for each and every day's delay in the laying of each and every pipe, special casting, and stop-cock not laid at the expiration of said thirty days, and the amount accruing to the District of Columbia under this provision shall be deducted from any moneys that may be due to said parties of the first part, and shall be forfeited to said District of Columbia as liquidated damages.

It is also expressly agreed that this contract is subject to the following extracts from laws of Congress:

"SEC. 6. And be it further enacted, That whenever it shall
63 become necessary to lay main pipes for the supply to the cities of Georgetown and Washington, the cost of the same shall be paid by the said cities, and the engineer aforesaid is hereby prohibited from making any contracts for the same unless approved by the corporations aforesaid, and expressly stipulated with the contractor or contractors that the payment for the same is to be made by the said corporations." Approved by the President March 3, 1859.

"SEC. 4. And be it further enacted, That the said engineer officer shall cause to be furnished and laid, from the distributing reservoir of the Washington aqueduct to Capitol Hill, in the city of Washington, along such route as he shall determine, an iron main of thirty-six inches in diameter, connected with the present mains, at such points as he shall direct, and that the entire cost thereof shall be borne apportionately by the corporations of Washington
64 and Georgetown; and in order to provide for such cost, the said corporations are hereby empowered and authorized to increase the present water rates and water taxes to such an amount as may by them be deemed necessary.

"SEC. 5. And be it further enacted, That for the purpose of enabling the corporations aforesaid to carry out the provisions of this act, it shall be competent for them to borrow, in such proportions as they may deem necessary, a sum of money not exceeding two hundred and sixty thousand dollars for the city of Washington, and forty thousand dollars for the city of Georgetown, redeemable within a period of ten years out of any revenue to be derived from water rents." Approved by the President July 14, 1870.

It is also expressly understood that this contract is subject to a law of the District of Columbia entitled "An act to provide for an additional supply of Potomac water, by means of the Wash-
65 ington aqueduct, to the cities of Washington and Georgetown, and authorizing a loan for said purpose," approved by the Governor July 20, 1871.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

(Signed) OWEN O'HARE. [L. S.]
" HENRY HIMBER. [L. S.]
" D. E. DAVENPORT. [L. S.]
" EDWARD MARTINDALE. [L. S.]
" GEORGE H. ELLIOTT, [L. S.]
Major of Engineers and Chief Engineer of Washington Aqueduct.
" EDWIN L. STANTON, [L. S.]
Acting Governor District of Columbia.

Approved Sept. 30, 1871.
(Signed) H. D. COOKE, *Governor.*

Signed and sealed in presence of—
Witnesses:
(Signed) A. S. WORTHINGTON,
As to signature of Edwin L. Stanton.
(Signed) R. DUNWOODY,
As to Major Elliott's signature.
(Signed) A. B. JOHNSON,
Witness for all but Major Elliott.

[Seal of the District of Columbia.] [18 5-cent revenue stamps.]

66 That said firm of O'Hare, Himber & Co., soon after the commencement of the work on their said division of the water main, abandoned their contract and refused to complete the work in full; and that thereupon, and on or about the 15th day of April, 1872, the engineer in charge of the work for the District of Columbia employed and agreed with the plaintiff to perform the labor and furnish the materials which O'Hare, Himber & Co. had agreed to perform and furnish, on that portion of the main from Rock creek to the market-house, in the city of Georgetown; and that for said work and materials the plaintiff was to be paid the same price which the said defendant had agreed to pay to O'Hare, Himber & Co. That one Davenport, who was a member of the firm of O'Hare, Himber & Co., who was duly empowered by said firm thereto, authorized the employment of the plaintiff by the District of
67 Columbia, and for that purpose wrote a letter in the words and figures following, to wit:

"WASHINGTON, D. C., *April* 15, 1872.

"General O. E. Babcock, Sup't Washington Aqueduct.

"SIR: I hereby authorize R. G. Campbell to lay the 36-inch water main from the west side of Rock Creek bridge to the public alley

east of the market-house on bridge street, and all work pertaining to the same under the contract of O'Hare, Himber & Co., and I will sign all vouchers and hereby authorize the money for the same to be paid to said R. G. Campbell.

(Signed) "D. E. DAVENPORT.

Witness:

(Signed) "THEODORE B. SAMO."

Which said letter was delivered at the time to General Babcock, who was in charge of said work for said defendant.

68 That the work of putting in the water main was under the general direction of General O. E. Babcock, and under the immediate direction of T. B. Samo; and on the reception by said Babcock of the foregoing letter, he, by a written communication (which cannot now be found) directed the plaintiff to perform the work aforesaid, and to commence the same immediately.

That about the 16th day of April, 1872, the plaintiff began the work, and that he was not provided with specifications by the said engineer, but in lieu thereof engineers and inspectors employed by the defendant were placed over him to direct his work, and who directed him what to do and how to do it. That the contract signed by O'Hare, Himber & Co. was not shown to the plaintiff, and he did not see it until after he had completed his work, and that no attention was paid to it by the engineers in their directions relat-

69 ing to the work; that the work was completed by the plaintiff in the latter part of July, 1872, and was approved and accepted; and that the work was well done by the plaintiff, was accepted, and is still in use by the District of Columbia.

That in the execution of said work the plaintiff was directed, by the engineers in charge, to take up and relay the tracks of the Washington and Georgetown Railroad Co. for a considerable distance, and that the defendant's agent agreed that the plaintiff should be paid therefor whatever sum the same might cost the plaintiff, and directed the plaintiff to keep account of such cost; and that the plaintiff took up and relaid the track, and kept an account of the cost thereof, and the amount of the cost of such work was $3,225.00; that the engineer immediately in charge of the said work was Theodore B. Samo, and he personally directed the plaintiff to take up the track of the Washington and Georgetown Railroad Co.

70 That after the making of the said contract with O'Hare, Himber & Co., and before the agreement with the plaintiff, the grade of the street in and along which the water main was to be laid was changed very materially and filled to a great depth with fresh earth, and in consequence of such change the quantity and expense of the excavation on this work was greatly increased, and thereby increased the expense of such work to the amount of $2,450, and that said sum was the value claimed by plaintiff for excavation of earth below the depth of eight feet, and that the depth of eight feet was the maximum depth of the excavation

upon which the contract with O'Hare, Himber & Co. was based, and that this would have been the greatest depth had said street not been filled up as aforesaid.

That the officers of the District failed to furnish at the proper time castings, pipes, and other materials which they were
71 bound to furnish, thus putting the plaintiff to great expense by reason of his workmen, tools, and capital being kept idle; and by reason thereof the plaintiff suffered damages amounting to the sum of $1,926.00.

That after a portion of the work had been completed by the plaintiff in accordance with the directions, and to the satisfaction of the subordinate engineers or inspectors of the defendant, the same was condemned by other officers higher in authority, and that the plaintiff was required to take up the work and do the same over again, at great and extra cost to himself, to wit, to the amount of $490.00.

That the plaintiff, at the request and by the direction of the proper officers of the defendant, performed other work and furnished other materials extra, and in addition to the work called for and required by the contract with O'Hare, Himber & Co., amounting in value in the aggregate to the sum of $1,923.95; and that for all
72 of such extra work and extra materials, and for taking up and relaying said railroad tracks, and for said additional excavations, and for said delays and hindrances, and for taking up and relaying work properly done, an account was made and by the plaintiff presented to the engineer in charge, a copy of which is attached as the "Particulars of Demand," to the declaration in the cause, save and except that in the item—"1,400 yards of excavation below eight (8) feet in depth at bridge @ $1.75,"—$2,450.00— the sum or total of the charge, to wit, the figures $2,450.00 were not inserted or filled in; that the said work was so done and the materials so furnished by the plaintiff at the request of the defendant; and that the engineer; the agent of the defendant, passed upon the said bill, and allowed some of the items, and disallowed others in whole or in part, and that the sum total of his allowances on the said account was only $1,807.90; and that after such allowances had been made by
73 the said engineer, the Legislative Assembly of the District of Columbia, passed an act, approved January 26, 1873, providing for the payment, among other things, of the amount of the said allowances, and that the said act of the Assembly, so far as it relates to the work, &c., of the plaintiff, is in the words and figures following, to wit:

"An act to provide for a deficiency of appropriation for laying the 36-inch and other water mains directed by act of Congress of July 14, 1870." The second section of which is as follows, to wit:

"SEC. 2. And be it further enacted, That in order to pay the said deficiency as reported by General Babcock, United States Engineer in charge, there be, and is hereby, appropriated out of the proceeds of said water bonds the sum of thirty-five thousand dollars, or so much thereof as may be necessary, payable as per report of General Babcock, as follows:

74 "To Messrs. Emmart, Dunbar & Co., eighteen thousand nine hundred and fifty-seven dollars and seventeen cents.

"To Messrs. Emmart & Smith, sixteen hundred and fifty-three dollars and ninety-five cents.

"To R. G. Campbell, eighteen hundred and seven dollars and ninety cents.

"Messrs. Jesse W. Star & Sons, nine thousand and four dollars and forty-five cents.

"Messrs. Robert Strong & Co., four thousand one hundred and sixty-two dollars and seven cents: Provided, That the said amounts shall be received in full of all claims on account of the said work: And provided further, That when Robert Strong & Co. shall have given a receipt in full, the penalty for non-fulfillment of their contract shall be and is hereby remitted: Provided further, That this receipt shall not debar the above named persons from any rights they may have in any court."

75 That the amount of such allowance was afterwards paid by the defendant to the plaintiff, and receipts were signed and delivered by him to the defendant, as appears by the following stipulation of counsel made and filed in the cause, to wit:

In the Supreme Court of the District of Columbia, this the 20th day of September, A. D. 1875.

ROBERT G. CAMPBELL
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 12593.

The attorneys for the respective parties stipulate and agree as follows:

The plaintiff herein is the R. G. Campbell mentioned in the act of the Legislative Assembly of said District, approved June 26, 1873, ch. 31. That after the passage of the said act the said plaintiff filed, or caused to be filed, with the board of audit of said district, the original of a paper hereto attached, purporting to

76 be a bill by R. G. Campbell against the District of Columbia, on account of a 36-inch water main, for $1,807.90, approved by O. E. Babcock, colonel of engineers, United States Army, and containing three receipts for different amounts in part payment of said claim, and each of them signed by the said plaintiff.

That said claim so filed was duly acted upon by the said board of audit, and that an award for the balance, $269.40, was made to said Campbell by said board of audit, and that on the 7th day of December, 1874, the said plaintiff signed a receipt to the said board of audit for their certificate for said balance, and that the paper hereto attached, headed "Washington, D. C., Nov. 24, 1874," is a correct copy of the original of said receipt, and that the two papers above described and attached to this stipulation shall be received

without further proof as correct copies of the originals and as evidence in said cause.

77 ENOCH TOTTEN,
Attorney for Plaintiff.
WILLIAM BIRNEY,
Attorney for Defendant.

District of Columbia, on account of 36-inch water-main, to R. G. Campbell, Dr.

1873.

For extra work done and materials furnished for the District of Columbia, 36-inch water-main, being amount allowed by the chief engineer as per his report to the Governor of the District of Columbia, dated May 3, 1873, and as per act of the Legislature of the District of Columbia, approved June 26, 1873, $1,807.90.

The above is correct.

O. E. BABCOCK,
Chief of Engineers, U. S. A.

Received, at Washington, D. C., this 29th day of September, 1873, from Colonel O. E. Babcock, corps of engineers, the sum of
78 one thousand dollars and —— cents in water bonds in part payment of the above account.

(Signed in duplicate) R. G. CAMPBELL.

Received, at Washington, D. C., this 3rd day of June, 1874, from Colonel O. E. Babcock, corps of engineers, U. S. A., the sum of three hundred and eighty-eight dollars and eighty-eight cents ($388.88), in part payment of the within account, in water bonds.

R. G. CAMPBELL.

Received, at Washington, D. C., this 29th day of July, 1874, from Colonel O. E. Babcock, corps of engineers, U. S. A., the sum of one hundred and forty-nine dollars and sixty-two cents ($149.62) in cash, in part payment of the within account.

R. G. CAMPBELL.

WASHINGTON, D. C., *Nov.* 24, 1874.

District of Columbia to R. G. Campbell, Dr.

For balance due for extra work on the 36-inch water-main,
79 as allowed by the engineer and the act of the Legislative Assembly, being the amount of his claim left unpaid on account of the appropriation having been exhausted, $269.40.

Original bill as allowed		$1,807 90
Paid Sept. 29, 1873	$1,000 00	
Paid June 3, 1874	388 88	
Paid July 29, 1874	149 62	
		1,538 50
Balance due		$269 40

Received this 7th day of December, 1874, from the Board of Audit their certificate No. 9184 for $299.40, in full settlement of the above-stated claim.

R. G. CAMPBELL.

And that no other or further payments have been made to the plaintiff by the defendant on account of such labor, materials, and damages; and then the plaintiff rested.

Thereupon the defendant, to maintain the issues on its part, offered in evidence certain entries and records of this court to show
80 that on the 22nd day of June, 1875, this cause came for trial, and that a jury was duly sworn, and that after the trial had proceeded a juror was withdrawn by the court, and an order was made referring the cause to the *or*ditor of the court to state the accounts between the parties; and that afterwards, and in December, 1875, the said auditor filed his report, in and by which he declared a balance due to the plaintiff from the defendant of $10,101,00, with interest; to which report the defendant in due time filed its exceptions, and that on the hearing said exceptions in the general term of this court (in the first instance) said report of said auditor was set aside by the following order, to wit:

"The motion of the plaintiff for judgment on the auditor's report, and the defendant's exceptions to said report, ordered for hearing here in the first instance, argued by Mr. Birney for the District of Columbia, whereupon the court remands the case to the cir-
81 cuit court for further proceedings there, in accordance with the opinion filed by Justice Wylie."

And that said cause having again come on for trial, on the 18th day of December, 1877, it was again by consent of counsel, referred to a special referee, who, on the 17th day of October, 1878, filed his report awarding to the plaintiff the sum of $3.068.50, with interest, to which report exceptions were filed, going to the whole sum so found due by said report and that afterwards the circuit court, after hearing, sustained all of said exceptions, set aside said last named report by an order bearing date December 28, 1878, in the words and figures following, to wit:

"Now comes here as well the plaintiff as the defendant, by their respective attorneys, and thereupon this case comes on to be heard upon the defendant's exceptions to the award of the referee
82 filed in this case, and the same having been heard, argued, and fully considered, it is considered that said exceptions be and the same are hereby sustained, and said award set aside."

And that from said judgment the plaintiff appealed to the general term, wherein the said judgment, on the 19th day of April, 1880, was affirmed by an order in the following words and figures, to wit:

"Now again come here as well the plaintiff as the defendant, by their respective attorneys; whereupon, because it seems to the court here, that there was no error in the judgment of the special term of December 27, 1878, allowing the exceptions of the defendant to the referee's award, and in setting aside said award; therefore it is considered that the said judgment of the special term be and is hereby

affirmed with costs. And the court thereupon orders that the case be and hereby is remanded to the special term for further proceedings according to law."

83 The defendant also gave evidence to show, and which tended to prove, that all the work done by the plaintiff was performed under the [in pencil:] (said) contract with O'Hare, Himber Himber & Co., to whose rights and liabilities he was to that extent subrogated.

And, the testimony being closed on both sides, the defendant moved the court to direct the jury to render a verdict for the defendant; which motion was granted, and the jury thereupon, in pursuance of directions by the court, rendered a verdict for the defendant; to all of which the plaintiff, by his counsel, then and there and before the giving of said verdict, duly excepted, and the exception was duly noted upon the minutes of the court at the time.

And the said plaintiff now tenders this his bill of exceptions, and the same is by the court allowed.

And in testimony whereof the said bill of exceptions is now, this thirtieth day of January, 1883, signed and sealed.

ARTHUR MACARTHUR, *Justice.* [SEAL.]

84 Endorsed: M. 18, p. 284. Filed January 30, 1883. R. J. Meigs, clerk.

Motion for New Trial on Exceptions. Filed Jan'y 30, 1883.

Supreme Court D. C.

ROBERT G. CAMPBELL *vs.* DISTRICT OF COLUMBIA.

And now comes the said plaintiff and moves the court for a new trial on the bill of exceptions.

ENOCH TOTTEN,
For Plaintiff.

Endorsed: M. 18, p. 284. Filed January 30, 1883. R. J. Meigs, clerk.

85 *Judgment below Affirmed in Gen. Term, Feb.* 9, 1883.

In the Supreme Court of the District of Columbia.

Proceedings in General Term. February 9th, 1883.

ROBERT G. CAMPBELL, Plaintiff,
v.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 12593.

And now comes here as well the plaintiff as the defendant, by their counsel, Mr. Totten for plantiff and Mr. Riddle for defendant.

Whereupon, because it appears to the court here that there is not in the record and proceedings, or in the judgment of the special term, any error, therefore it is considered by the court here that

86 the said judgment be, and the same is hereby, affirmed, the plaintiff's motion for a new trial upon exceptions notwithstanding; and that the defendant recover against the plaintiff the costs of the case in this court, to be taxed by the clerk, and have execution therefor.

87 *Writ of Error to S. C. U. S.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Robert G. Campbell, plaintiff, and District of Columbia, defendant, No. 12593, at law, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this 27th day of February, in the year of our Lord 1883, and of the Independence of the United States the one hundred and seventh.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit.*

To the District of Columbia:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Robert G. Campbell is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

Service acknowledged.

A. G. RIDDLE,
Att'y for Def't.

Feb'y 27, '83.

88 *Bond of Appeal to S. C. U. S.*

In the Supreme Court of the District of Columbia, the 15th day of February, 1883.

ROBERT G. CAMPBELL
vs.
THE DISTRICT OF COLUMBIA. } No. 12593. In Error.

Know all men by these presents that we, Robert G. Campbell, as principal, and Elias E. White, as surety, are bound unto the above-named District of Columbia in the sum of one thousand dollars, to be paid to the said District of Columbia; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 15 day of February, 1883.

Whereas the above-named Robert G. Campbell hath prosecuted a writ of error to the Supreme Court of the United States to
89 reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Robert G. Campbell shall prosecute his said writ to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

R. G. CAMPBELL. [SEAL.]
ELIAS E. WHITE. [SEAL.]

Sealed and delivered in presence of—
W. B. HOLTZCLAW.

I think this good.

RIDDLE,
For Dist.

Approved February 27th, 1883.

D. K. CARTTER,
Ch'f Just.

90 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court, this 9th day of March, 1883.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal, this 9th day of March, 1883.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court, this 9th day of March, 1883.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

Endorsed on cover: Dist. of Columbia supreme court. No. 207. Robert G. Campbell, plaintiff in error, *vs.* The District of Columbia. Filed 20th March, 1883.

117-615

Office Supreme Court U. S.
FILED
MAR 24 1886
JAMES H. McKENNEY,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

ROBERT G. CAMPBELL,
Plaintiff in Error,

vs.

THE DISTRICT OF COLUMBIA.

No. 207.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

This is an action of assumpit for work done and materials furnished for the defendant by the plaintiff in error, in the construction of a portion of the water main, authorized by the act of Congress, approved July 14, 1870. (16 Stat., 276.)

This statute directed that this main should be laid "from the distributing reservoir of the Washington acqueduct to Capitol Hill in the City of Washington," the expenses of which were to be paid by the cities of Washington and Georgetown. Provision is made by the fifth section of the statute, for borrowing money to defray such expenses. By the act of Congress, approved February 21, 1871, (16 Stats., 419), the corporations of the cities of Washington and Georgetown were abolished and the entire District was

created a municipal corporation, which succeeded to all the rights and liabilities of the corporations so abolished by that law.

By a contract in writing, and under seal, bearing date September 21, 1871, the proper representatives of the District of Columbia agreed with a certain firm doing business under the name of O'Hare, Himber & Co., for the construction of that portion of the main called the "Georgetown Division" (7, 9, 18), being that part extending from the west side of "foundry branch to Rock Creek Bridge."

The contracting firm of O'Hare, Himber, & Co., soon after they commenced the work on their division, abandoned their contract, and refused to complete the work in full (21). At this juncture of affairs the representatives of the defendant employed the plaintiff to construct that part of the main included in the contract, which extends from Rock Creek to the market-house in Georgetown, for which the plaintiff was to be paid the same price which the defendant agreed to pay to O'Hare, Himber & Co. One of the members of that firm assented to this employment of the plaintiff. In addition to this the contract itself authorized the engineer officer in charge of the work, upon failure of the contractors, to employ other persons to complete the work (17).

On the 16th day of April, 1872, the plaintiff began the work. He was not provided with specifications by the engineer, but in lieu thereof engineers and inspectors employed by the defendant, were placed over him to direct his work and to tell him what to do and how to do it. The contract signed by O'Hare, Himber & Co. was not shown to the plaintiff, and he never saw it until after he had completed his work, and no attention was paid to it by the engineers in their directions to the defendant relating to the work. The work was completed by the plaintiff in the latter part of July, 1872, and was approved and accepted

by the defendant; it was well done, and is in use by the defendant for the benefit of the public.

The matter in dispute in this case relates to work done and materials furnished which were not included in the written agreement between the defendant and O'Hare, Himber & Co., but were extra and in addition to it.

The plaintiff's demand consisted of many items particularly set out in the paper attached to the declaration in the case, and called the "Particulars of Demand." These items consisted of a charge for taking up and relaying a railroad track; for excessive excavations made necessary by the act of the defendant in filling up the street between the time of making the contract with O'Hare, Himber & Co., and the agreement with the plaintiff; for unreasonable delays caused by the defendant in failing to furnish the castings, pipes, &c., which it was bound to furnish, whereby the plaintiff and his workmen, tools, &c., were kept idle; for the cost of tearing up and doing again certain work which had been done by the plaintiff under and according to the directions of the officers of the defendant put over him and by them approved, and for a great deal of extra work, &c., particularly mentioned in the particulars of demand filed with the declaration. (4 and 23.) Evidence was given by the plaintiff to the jury on the trial to show that these several items amounted to about $9,000.00.

The plaintiff, after the work was completed, presented to the engineer in charge of the work a claim for such extra work, &c., substantially like the bill of items attached to the declaration, and the engineer allowed some of the items and disallowed others. The amount of the items allowed was $1,807.90. (23.) For this sum the Legislative Assembly of the District made an appropriation in favor of the plaintiff, and the plaintiff gave a receipt therefor, which on its face declares that it is "in full settlement of the above-stated claim." (26.)

The act of the Assembly referred to, appropriated money to pay the claims growing out of this public work of several firms, and it concluded with a proviso to the effect that the receipts given for the funds so appropriated should not debar those persons from any rights they might have in the courts. (24.)

The defendant gave evidence to the jury on the trial, to show that the work done by the plaintiff was performed under the contract with O'Hare, Himber & Co., to whose rights and liabilities he was subrogated.

The evidence of both parties being closed, the defendant asked the Court to instruct the jury that on the whole evidence the plaintiff could not recover, and that the defendant was entitled to their verdict; this was done, and the plaintiff excepted.

The General Term of the Court affirmed this judgment, and the case was brought here on writ of error.

Assignment of Error.

The Court erred in instructing the jury that the defendant was entitled to a verdict.

Argument.

It appears by the record (26), that this case was twice referred to an auditor or referee. The first reference resulted in an award in favor of the plaintiff for $10,101.00 with interest; the second resulted in an award for $3,068.50 with interest. Both of these awards were set aside by the Court; the first in the General Term, and the second in the Circuit Court. The reasons for the action of the General Term on the first hearing, as assigned by that Court, will be found reported in 2d MacArthur, 533. On the two hearings which were subsequently had, opinions were not preserved.

The work of taking up and relaying the tracks of the Washington and Georgetown railroad was work which was not included by the terms of the contract with O'Hare, Himber, & Co. The only provision of the contract upon which the opposite theory can be asserted is that in the begining of the specifications, where the different kinds of work to be done are enumerated, one of them is "taking up and replacing street pavements *and other surfaces*." A street railroad cannot be called a "surface" by any fair construction. It was not so understood by the parties who were engaged in the work in behalf of the defendant. Mr. Samo who was in charge of the work for the defendant, personally directed this work to be done by the plaintiff and agreed that he should be paid the cost of doing it; he also directed the plaintiff to keep an account of such cost, which was done.

The plaintiff is entitled to recover in this action the damages for delays caused by the defendant. He is entitled to to recover a reasonable price for the work which he completed; of course the price of work is increased by unlooked for delays, and the proof shows damages to the extent of $1,926. The court below, when the case was first before the general term, held that such damages could not be recovered in this form of action, and for that reason held that the auditor should have rejected this item. But, it is submitted, this was error. The opinion also dwells upon the stipulation of the contract. (2 MacArthur, 536.) But the special covenants and stipulations in the agreement were not binding upon the plaintiff; he was not a party to it, and did not even see it.

The item for $490.00, the cost of tearing up and doing over again, part of the work which had been done according to and under the immediate direction of an agent selected and employed by the defendant for that purpose, should be recovered by the plaintiff. It would be ex-

tremely unjust to shift the risk of the incompetency of the defendant's engineers upon the plaintiff. He performed the work as he was directed by the special agents of the defendants. "Engineers and inspectors employed by the defendant were placed over him to direct his work, and who directed him what to do and how to do it." (22.) These officers approved the work, and that act was binding upon the principal.

The other items of the claim for extra work, amounting to $1,922.95, ought to be allowed, unless the plaintiff has estopped himself by his receipts (25, 26).

The Court below, as I understand the final decisions, rested its judgments upon the ground that the plaintiffs' right of action, however just it might have been, was barred by this final settlement. The determination of this question will depend upon the language of the statute, which provides for the settlement. That statute is entitled "An Act to provide for the deficiency of appropriation for laying the 36-inch and other water mains directed by the Act of Congress of July 14, 1870" (23). The act, then, appropriated $35,000 to be paid, according to the report of General Babcock, to four different firms, in addition to the plaintiff. The last item of the appropriation is in favor of Robert Strong & Co., which is immediately followed by three successive provisos, in this language:

> "*Provided*, That the said amounts shall be received in full of all claims on account of said work; and provided further, that when Robert Strong & Co. shall have given a receipt in full, the penalty for non-fulfillment of their contract shall be and is hereby remitted; Provided further, that this receipt shall not debar the above-named persons from any rights they may have in any Court."

It seems plain that the intention here was to pay to the several persons mentioned, the amounts allowed by the engineer officer to them, respectively, and to leave all other

claims (except in the case of Strong & Co)., unaffected by the payments. The first proviso was probably inserted in the original draft of the bill, but it was found necessary to change and add to the bill. The proviso relieving Strong & Co. from the forfeiture was probably added by way of amendment, and the first proviso which requires the amount to be "received in full" being unsatisfactory to some of the parties interested was rendered inoperative by the last proviso. It certainly has some office to perform, being the last expression of the legislative mind. It can hardly be said to apply to Strong & Co., because they, instead of holding claims against the District were suppliants for relief from a forfeiture due to the District, and the proviso which applies solely to them and grants relief from the penalty for the non-fulfilment of their contract, expressly requires that the penalty shall stand remitted only when Strong & Co. "shall have given a receipt in full." It seems reasonable, therefore, that the last or third proviso was intended to apply to all the other persons and not to Strong & Co.; after the special provision for the benefit of that firm the statute provides that the receipt of the money so appropriated, "shall not debar the above-named persons from any rights they may have in any court."

In view of these statutory directions as to the terms of the settlement with Campbell, it is difficult to see how it could have been the intention of the parties who made the settlement under this appropriation act, that Campbell should be estopped. The whole account as stated (25–26), is based upon the act of the Legislative Assembly, and the last receipt (26), is stated to be "in full settlement of the above stated claim," *i. e.*, the allowances made by that statute. It is submitted that the judgment of the Court below should be reversed and that a new trial should be ordered.

ENOCH TOTTEN,
Att'y for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 207.

R. G. CAMPBELL, PLAINTIFF,

vs.

THE DISTRICT OF COLUMBIA, DEFENDANT.

In Error to the Supreme Court of the District of Columbia.

BRIEF FOR THE DISTRICT.

A. G. RIDDLE,
For the District of Columbia.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 207.

R. G. CAMPBELL, PLAINTIFF,

vs.

THE DISTRICT OF COLUMBIA, DEFENDANT.

In Error to the Supreme Court of the District of Columbia.

BRIEF FOR THE DISTRICT.

This case is somewhat peculiar in its origin and structure and curious in its history. Commenced June 12, 1874, its course was active and troublesome till its rest in this Court of three years. It arises out of the water supply of the two cities by the District resting primarily on the act of Congress of March 3d, 1859, (11 Stats., 435,) the general act relating to the water supply, the 6th section of which charges the costs upon the cities, also the act of July 14, 1870, which required the engineer in charge of the water works to lay a 36-inch water main from the reservoir in Georgetown to Capitol Hill. (16 Stats.)

This matter, the 36-inch main, was provided for by act of the District Legislature of July 20, 1871, chapter 17, acts first session, p. 17.

September 27, 1871, the engineer entered into a contract with O'Hare, Heimber & Co. for a certain portion of the work. (Rec., pp. 7 to 21, inclusive.)

It seems the firm never actively undertook the work, but authorized Davenport, one of the firm, to enter into an arrangement with the plaintiff to do certain of the work, to which Babcock, then chief of the water works, assented, (pp. 21, 22.)

The plaintiff went forward under the contract and the engineer, and was paid from time to time until comlpeted, when he claimed $10,084 for extra work, the whole of which was at no time submitted to the engineer as the contract required, (p. 16.) Upon what was submitted the sum of $1,807.90 was allowed, (pp. 23 and 24.) This was conclusive under the contract by the provision cited from p. 16.

This sum was paid in full. (See statement of account and receipts of plaintiff, p. 25.) The first, September 29, 1873; the second, June 3, 1874; the third, July 29, 1874; the fourth, November 24, 1874. Meantime, the suit was commenced June 12, 1874, as stated.

The plaintiff was permitted, in his own name, to enforce the O'Hare contract. His suit was for *quantum meruit*. To his claim the defendant plead the general issue, and later, a plea *puis darrein continuance*, (pp. 5, 6). Ordinarily the sole issue that could be tried would be on this plea. Not so in this case, however; no attention was paid to that quality of it. For the history of the case itself recourse must be had to the bill of exceptions on which the case passed from the trials of the courts below to the repose of this, beginning at page 7. It seems the case came up for trial in the circuit court in June, 1875, when a juror was withdrawn and the case referred to the Auditor to state an account. He found a balance due the plaintiff of $10,101, with interest. To this the plaintiff filed exceptions, and the case was heard in the general term, the exceptions sustained, and the case remanded. (Rec., p. 26.) See case, (2d MacArthur, 533,) a curious study in jurisprudence of half seeing.

The case came up again in the circuit court in December.

1877, when it was referred to a special referee. His report found due the plaintiff $3,068.50, with interest.

To this the defendant excepted, the exceptions going to *every item* the whole sum allowed. The circuit court sustained all the exceptions. On appeal and full argument the general term affirmed this judgment. (Rec., pp. 26 and 27.) There is no report of this decision, nor written opinion. As it went to the merits of the case it would seem as if, on remanding, final judgment might have followed.

It may be observed that the record now before the Court does not contain any of these proceedings, and only the journal entries and minutes given in evidence by the defendant at the final trial (p. 26), showing that such proceedings were had, neither awards, findings, evidence, nor exceptions are set forth; nothing but a statement of them and copies of the orders of the court setting aside the awards.

In this condition of things the plaintiff called up his case January 30, 1883 (Rec., p. 6), and had a jury sworn. Clearly with the knowledge then that all the judges were advised on all the points of law and fact, the trial, any trial, would be merely perfunctory. Instead of actually offering his evidence item by item, and so really raising all the questions he wished, the plaintiff has it that all his testimony was admitted; the defendant put in so much as reminded the court of the rulings in the case, when, as shown, the court instructed the jury to return a verdict for the defendant, to which he excepted. Was this error?

What other question can now arise in this Court?

Obviously the plaintiff does not care to get rid of this verdict and judgment to find himself before another jury in precisely the same conditions as before.

What else can he secure, even if it is now found that the court erred in its instruction to the jury?

The necessities of his case require that the two adverse decisions of the general term be reversed; that it be decided that he was not bound by the O'Hare contract. How can

any of these matters be passed upon here? What is there in this record to show what questions were made on either hearing below?

It is largely matter of inference that some questions were raised and passed upon, but it does not certainly appear that he ever contended that he was not bound by the O'Hare contract. If he was, under the law, as now abundantly ruled, he can have no case. He was bound to submit everything to the engineer, whose decision is conclusive. (See Rec., p. 16.)

What is there now here for submission to this Court, save the one question—Did the court err in directing the jury to return a verdict for the defendant? Does the record contain any means by which the Court can pass on that question? I submit there is none, unless it is claimed that it is error for the court—both parties having given evidence—to direct such action by the jury. This will hardly now be contended for.

See Schofield *vs.* C. M. & St. P. R. R. Co., 114 U. S., 615, and cases cited by Justice Blatchford.

Clearly there is no error in this record.

A. G. Riddle,
For District of Columbia.